

STATE WATER RESOURCES CONTROL BOARD

PUBLIC WORKSHOP

REGARDING JOSEPH SAX'S REPORT ON THE
LEGAL CLASSIFICATION OF GROUNDWATER

WEDNESDAY, APRIL 10, 2002

9:00 A.M.

CAL/EPA BUILDING

COASTAL HEARING ROOM

SACRAMENTO, CALIFORNIA

REPORTED BY:

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APPEARANCES

STATE WATER RESOURCES CONTROL BOARD:

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AUDIENCE:

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SACRAMENTO, CALIFORNIA

WEDNESDAY, APRIL 10, 2002, 9:00 A.M.

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CHAIRMAN BAGGETT: Good morning. I'm Art Baggett, Chair of the State Board. I am here with Pete Silva. We are here for a workshop as noticed to receive comments on the report prepared or a white paper prepared for this Board by Professor Sax on subterranean streams, as you're all aware. We have lots of cards.

I'd first like to give a brief history on how we got here. Some of you were involved. Some, I repeat, came in just as we are beginning this process.

A little over two years ago we had an had issue which raised a lot of concerns regarding a water right hearing and the determination of subterranean stream. At that point I was still fairly new to the Board, and Jim Stubchaer, as I recall, was still Chair, just getting ready to leave the Board. And I asked the Chair at that point, I said, "We need to take a timeout here."

The Board is going to be changing. I was new. Pete had been offered the appointment though he had not been sworn in. I know he was coming on board in the next couple of months. I knew sooner than later, ended up being later, we would have a third new appointee, and felt that an area of this significance, with this much concern that we should

1 sit back and look at a little bit, put together, as you all
2 know one of the working groups.

3 Out of that work group came a recommendation to hire
4 actually Professor Sax as someone who hadn't been involved
5 in this particular issue, but was obviously well regarded as
6 one of the several professors in water law minds in this
7 country. It ended up taking us, I believe, an extra year
8 just to get the contract with the University of California,
9 which we thought was going to be a simple thing. So time
10 drug a little longer than we probably would have liked.

11 But I think for me the opportunity that we have on this
12 Board and now having spent almost three years here is
13 unique. I've had the pleasure of getting to know Justice
14 Hobbs from Colorado and a number of western states or our
15 colleagues in other states. And I think with our system
16 here we do have an opportunity which a traditional court
17 wouldn't have. While we have the quasi adjudicatory aspect,
18 we can also take, say timeout, we want to sit down and study
19 this measure, have a work group, understand these issues a
20 little more thoroughly than a traditional court would just
21 be forced to rule in a time frame.

22 That is what we have done with this issue. As a lot of
23 lawyers know, in law school maybe five minutes on
24 subterranean streams. It was something that I remember the
25 words. From my days it is not something in my particular

1 practice I had ever been directly involved in. So this gave
2 an opportunity and for Pete, who is a very good civil
3 engineer with his background likewise is not in this area.
4 So it gave us a chance to come up to speed. And I think
5 Professor Sax provided us with an incredibly thorough
6 examination of the history of issues facing this Board.
7 And that was, quite frankly, one of my goals to get that
8 background and history. Recommendations are another
9 matter.

10 I think we really clearly understand certainly not this
11 Board's purview to take over the role of the Legislature.
12 That is the role of the Legislature, to pass laws, not ours,
13 and the governor to sign those laws if appropriate.

14 So today we got a report. We would welcome comments
15 on, I guess, a number of things. I am particularly
16 interested in procedure. If we -- how do we, as we move
17 forward in the future, make determinations of whether it is
18 a stream or an underflow or however we want to define it, is
19 jurisdiction or not. How do we procedurally do that? It's
20 a issue facing this Board regularly and our staff
21 regularly. They get questions. They get comments. They
22 get applications. We haven't made those determinations.
23 It's been done varying ways over the past 70 years or so.
24 That is something I would certainly like to hear some
25 comments about.

1 Otherwise, I know it's a lot of work. We've read --
2 got a lot of comments and Pete and I are very familiar with
3 them, and have both attended at least one of the working
4 sections that Professor Sax had and pretty involved in this
5 process. Recanting details in the process, we understand
6 that. So if we can just, I guess, cut to where you think we
7 should go from here. If nowhere let us know that. If it's
8 adopting every recommendation, let us know that. That is
9 the idea of a workshop, to get the comments and to do it in
10 a public forum.

11 With that, we have a number of cards from ACWA.

12 Steve, is this orchestrated?

13 MR. HALL: Orchestrated may be an overstatement, but it
14 is a group effort.

15 CHAIRMAN BAGGETT: Very well.

16 MR. HALL: Good morning. My name is Steve Hall. I am
17 the Executive Director of the Association of California
18 Water Agencies. We represent urban and agricultural water
19 agencies around the state.

20 I will be followed by a small panel of people who have
21 been instrumental in putting together the ACWA comments,
22 which I think are close to 40 pages with appendices. I want
23 to begin by --

24 CHAIRMAN BAGGETT: I haven't seen those comments.

25 MR. HALL: They were hand delivered a couple of days

1 ago.

2 CHAIRMAN BAGGETT: I was looking for them last night.
3 I've got lots of comments, but none from ACWA.

4 MEMBER SILVA: I haven't seen those either.

5 MR. HALL: You will get them today. My apologies.

6 CHAIRMAN BAGGETT: I'm sure we will --

7 MR. HALL: If it had been up to me to deliver them, I
8 would seriously question myself, but it was left up to my
9 assistant who is pretty conscientious about this stuff. We
10 will make sure you get them in due course.

11 Thank you, David.

12 Let me again say thank you to the Board for holding
13 these workshops, for retaining Professor Sax. We recognize
14 that this was done in part because of the concerns expressed
15 by ACWA and its members and by the request that we made for
16 a review. We think this process, at least to date, has
17 served the purpose that we envisioned, which is to shine
18 some light and bring some focus to the test being applied to
19 distinguish between percolating groundwater and subterranean
20 streams. Irrespective of where the Board goes, we believe
21 that this light shining, this focus, has been very helpful.

22 We hope and believe that it will give the Board an
23 opportunity to provide clear guidance to its staff and to
24 send a clear signal to the water community and other
25 interests about how the Board intends to proceed in the

1 future in determining the difference between subterranean
2 streams and percolating groundwater. That is your job. Our
3 comments are intended to assist you in doing that, and we
4 hope they will.

5 It would be, frankly, remiss of me to not also thank
6 and acknowledge Professor Sax. His work is obviously
7 thorough and scholarly. We do disagree with many of the
8 conclusions in the report and the recommendations. But that
9 said, we still acknowledge the very fine work that Professor
10 Sax did in his research. Frankly, I believe that his
11 report, primarily because of its scholarly research, will be
12 used by people for years, perhaps decades to come, as we
13 debate and discuss how groundwater should be managed in the
14 state of California.

15 In response to the report, we tried to provide an
16 equally competent and credible work. And I take no personal
17 credit for it, but I can say that ACWA is blessed to have
18 some of the foremost legal and groundwater experts at its
19 disposal through its membership and the consultants that it
20 can call upon, and they were put to work and they worked
21 hard to produce the comments that sooner or later you will
22 get to see.

23 We have developed a response that we think is worthy of
24 the Board's consideration as you deliberate on how to guide
25 your staff and make your own determinations with respect to

1 percolating groundwater and subterranean streams.

2 Let me briefly describe what's in our response. And
3 then I am going to turn it over to the people who really did
4 the work. The main body of the report is broken down into
5 three sections. The first is simply an introduction that
6 provides background. The second section addresses the
7 question of whether the report premise that California needs
8 substantial changes in its system of groundwater regulation
9 is actually supported by the report's analysis.

10 We regretfully have to conclude that the recommendation
11 that the Board expend its jurisdiction is not supported by
12 the report's analysis.

13 Finally, section three of the comments addresses the
14 report's discussion of the State Board's jurisdiction under
15 Water Code Section 275, the Public Trust Doctrine. Once
16 again, we have to disagree with the report's conclusions
17 about what the Board should do in this area of the law.

18 And then we have three appendices that go with the
19 report. Appendix A includes the considerations relating to
20 subterranean streams flowing in known and definite channels.
21 This is very simply a technical treatise on the factors that
22 do go in as a hydrologist or a groundwater geologist looks
23 at a subterranean stream versus percolating groundwater, the
24 factors that should go into its consideration.

25 Appendix B was written by Dr. Steve Bachman who is the

1 chairman of ACWA's groundwater committee and also served on
2 Professor Sax's technical advisory committee. It describes
3 in somewhat greater detail the factors that can play
4 appropriate roles in determining whether or not a given set
5 of circumstances is indicative of a subterranean stream
6 flowing in a known and definite channel. You can tell I am
7 reading that because I want to make sure that I got that one
8 right. It, again, is I think worthy of the Board's
9 consideration.

10 Finally, Appendix C provides technical comments on the
11 criteria proposed in the report for measuring impacts on
12 surface waters. And, obviously, this is extremely
13 significant, that this issue of impact versus a bed and
14 banks test. It really goes to the heart of what the Board
15 has to consider.

16 I have to say that I'm simply reflecting the views of
17 the true experts in this. We do not feel that the test that
18 has been applied by the Board of bed and banks is
19 fundamentally broken. We think in the issue of Pala/Pauma
20 there may have been a misapplication of that test. But that
21 does not mean that the test itself has not served the Board
22 and the state well over the years that it has been applied.
23 It certainly does not justify somehow fundamentally changing
24 a test that the Legislature has not only adopted but
25 reaffirmed.

1 Now, obviously others will have different views about
2 that. But what I propose is that we move on to the people
3 who did the work for ACWA. I'm going to turn it now over to
4 Bob Maddow who chaired the legal affairs committee and who's
5 had an interesting job meshing together the bright legal
6 minds that make up our legal affairs committee, particularly
7 on an issue as complicated and as contentious as this. So
8 I'm going to turn it over to Bob.

9 MEMBER SILVA: Just real quick, as you're making your
10 presentations, I guess on the technical aspects of it, it
11 sounds like you are saying there doesn't need to be a change
12 or any kind of modification of what we do on the technical
13 side of interpreting the statute.

14 MR. HALL: I don't want to avoid your question, Pete,
15 but I think it's better answered by Joe Scalmanini, our
16 groundwater expert who is going to be part of our panel.

17 MEMBER SILVA: Okay.

18 MR. MADDOW: Mr. Chairman, Mr. Silva, I appreciate the
19 opportunity to be here. I am just going to speak for a
20 moment. Because when Steve talks about the real experts on
21 groundwater law and groundwater technical matters, I don't
22 number among myself that group. We do have some experts
23 here.

24 I just wanted to give you a sense of how the package,
25 which unfortunately has not reached you, came together. As

1 you noted, Chairman Baggett, and Steve Hall said, ACWA kind
2 of came together at the time of an earlier proposed decision
3 with regard to some basins down in the San Luis Rey system
4 and began to focus on the issue which the Board has now had
5 before it through its own consideration through earlier
6 workshops and through Professor Sax's report, and we have
7 spent a considerable amount of time following, focusing on,
8 attempting to play a constructive role in the efforts that
9 the Board has gone forward.

10 As Steve mentioned, I chaired the ACWA Legal Affairs
11 Committee. That is a committee of approximately 45 lawyers
12 from throughout the state. At one time or another about a
13 third of that number has been directly involved in the
14 process that led to the development of the report that is
15 the document that we are attempting to get before you.

16 Similarly, ACWA has a large and active groundwater
17 committee. That is chaired by Dr. Steve Bachman. He will
18 be at your workshop tomorrow in Ontario. But the work that
19 has been done is a representation of the coming together of
20 both what we believe are the best technical minds and the
21 best legal minds. And I simply am standing up here to
22 represent that to you today.

23 And I think rather than have me stand here and again
24 summarize the products that Steve Hall just did in excellent
25 fashion, perhaps the best thing we can do is to get one or

1 two of our number up before you with some specific
2 statements about the report that are perhaps a more pointed
3 summary of what we have said from a legal perspective and
4 then in particular to get Joe Scalmanini to come up to
5 respond perhaps directly to the question that Mr. Silva just
6 asked.

7 So what I would like to do is ask Dave Aladjem to come
8 and speak on behalf of the legal portions, those lawyers who
9 contributed to the legal portion of this. Anne Schneider is
10 also here. Anne, David and I will certainly be available to
11 take any questions from the Board. And as soon as David is
12 finished, Joe Scalmanini will follow him on the technical
13 issues.

14 CHAIRMAN BAGGETT: Bob, in terms of procedurally, the
15 question I raised, do you want to answer that or do any of
16 the other attorneys want to?

17 MR. MADDOW: I think what we will do is have all the
18 questions on the legal side, David lead off. The rest of us
19 can respond to questions, if there are follow-up questions.
20 On the technical have Joe lead off. That way you have the
21 real point people.

22 Thank you.

23 MR. ALADJEM: Good morning, Chairman Baggett, Mr.
24 Silva. David Aladjem, Downey, Brand, Seymour & Rowher, for
25 ACWA this morning.

1 I want to very briefly give you a summary of the
2 lengthy legal document you've got there. As Steve said
3 earlier, our focus is that the system that you have
4 developed, the Legislature has created, that you've
5 implemented very successfully over almost a century isn't
6 broken, and, therefore, no major changes really are
7 necessary. I want to explain to you how we get to that
8 conclusion in a few points.

9 First of all, we go into this in some detail, and I'll
10 be glad to take questions if you have them. We believe that
11 the Legislature knew exactly what it was doing in creating
12 the test of subterranean streams. Professor Sax's report,
13 as Steve alluded to, is quite scholarly and quite detailed.
14 And we believe that it shows that what the Legislature
15 intended was to adopt the standard in Pomeroy of a
16 subterranean stream flowing in a known and definite channel
17 for your jurisdiction over groundwater.

18 That being said, the question that Chairman Baggett
19 raised, well, how do we implement this, how does that work,
20 Professor Sax has a lengthy discussion, I believe it's about
21 12 pages, about all of the Board's decisions under Water
22 Code Section 1200. And we believe that any individual
23 lawyer will quibble about some case.

24 Overall, the Board and staff over history have gotten
25 those cases correct. The Board has been able very

1 practically, consistent with the Legislature's direction, to
2 implement the subterranean stream standard. And, obviously,
3 there is some concern about the Pala/Pauma decision.

4 However, we believe that should not obscure the fact
5 that overall the Board has been able to implement this test
6 with very little controversy over the years. You have done
7 that by looking at a number of different factors. We lay
8 those out in Appendix B. That is Steve Bachman's
9 discussion. We have done that on a case-by-case basis,
10 looking at those characteristics of each stream system. We
11 believe that is the way to move forward. It's been
12 successful in the past and it can and will be successful in
13 the future.

14 The more detail about how ACWA believes that you can
15 actually implement the test when you are confronted with a
16 stream system that's got surface water, groundwater,
17 gradients going every which way, I want to turn those
18 technical questions over to Joe Scalmanini. Be glad to have
19 questions later.

20 Joe.

21 MR. SCALMANINI: Good morning. I'm Joe Scalmanini with
22 the firm of Luhdorff & Scalmanini, Consulting Engineers.

23 With all that lead-in or as Bob Maddow whispered to me as
24 he sat down, I've got you teed up. How much time do I have
25 to talk about this? I'll try to do this in a few minutes.

1 I think that two introductory comments are appropriate.
2 One is we could spend a fair amount of time talking about
3 what is proposed in the Sax report as criteria or test
4 determining, and that a lot of that would be, I'd say,
5 fairly negative or raise a lot of questions or comments
6 about things that aren't defined or potential loopholes or
7 challenges, et cetera. And the alternative is to discuss
8 what authority in place can and has worked and can continue
9 to work. What I am prepared to do in detail is the second
10 of those and refer you to the last appendix attached to the
11 ACWA comments, which discusses issues with the criteria
12 proposed by Sax.

13 Fundamentally, what this subject is all about in the
14 simplest of terms is the occurrence of groundwater, in what
15 setting or how does groundwater occur under the surface of
16 the earth. And as a way of trying to emphasize the fact
17 that you can do it and have done it, et cetera. I will put
18 it in just a little bit of personal context.

19 I was reminded by a phone call yesterday when I
20 returned from spring break vacation with my family from my
21 alma mater that my 35th reunion was going to take place in
22 June. So I guess I say that only because I've been doing
23 this now for 35 years in a couple months and know that it
24 can be done.

25 As I said, this is all about defining the occurrence of

1 groundwater. It is based on interpreting a collection of
2 geologic information, groundwater level information,
3 information on the yields of wells and characteristics, the
4 so-called hydraulic characteristics of aquifer materials in
5 which wells are completed, and lastly something about the
6 quality of water that occurs on the surface or in the
7 subsurface.

8 One can progressively go through those, and I will do
9 that for a few minutes, not in great, great detail, but just
10 to point out what can be done and how it has been done. But
11 ultimately when you get to the finish at looking at all of
12 those, there is a last factor which we point out rather
13 briefly in our comments, which is the so-called common sense
14 factor, that when you get all finished this better look like
15 some kind of subterranean stream channel and it better fit
16 the general characteristics of one, which I will talk about.
17 If it doesn't, it's just not there. And no collection of
18 words can make it exist.

19 Since I was so involved in the Pauma matter, I'm going
20 to try to be on my good behavior and not use that word
21 anymore.

22 CHAIRMAN BAGGETT: Yes. That's still before this Board.

23 MR. SCALMANINI: I know that.

24 But that issue is what I call the common sense factor
25 is probably a lot of why this whole thing is going on. At

1 any rate, the occurrence of groundwater and how it occurs
2 relative to a watercourse or relative to some kind of
3 subterranean stream channel can be done and has been done,
4 and one needs only to look at some of the technical support
5 for some of the cases or issues that are discussed in the
6 Sax report to see that that has successfully been done in
7 the past.

8 A few minutes on each of those factors that I talked
9 about which are summarized or dealt in the same progression
10 in both Appendix A and Appendix B of the ACWA comments. As
11 was said in the introduction, Steve Bachman prepared
12 Appendix B. I did Appendices A and C. It's basically the
13 same discussion of parameters. And I think you will hear
14 from Steve tomorrow the same kind of support for the fact
15 that you can do this and we do do this in the practice all
16 the time.

17 As far as the first of geology in the system, we know
18 enough with modern tools. We have available to us
19 descriptions of the subsurface from borings of various types
20 that are related to the subsurface. We have geologic
21 reports, surface and subsurface geologic mapping,
22 geophysical tools that will explore the properties of the
23 earth from the surface or in the subsurface. And in some
24 cases we have remote sensing techniques that allow us to
25 define what the structure of the earth looks like, such that

1 it might possibly contain water in a channelized form or
2 some other configuration.

3 And we can, by interpreting those, define whether or
4 not a feature exists that might contain water that would fit
5 the kind of description that has been, again, considered for
6 a hundred of these years, being some type of a channel that
7 would be a subject of a permitting authority.

8 Ultimately, I think that a goal should be able to
9 describe that subsurface feature, if it's going to fall
10 within a permitting authority, with sufficient precision
11 that if we went out there, so to speak, figuratively, this
12 afternoon and we drilled into the subsurface, then we could
13 tell whether we were in it or not. Because if you or I are
14 going to be a well owner, then we ought to know what
15 materials we're completing this well in, and, therefore, be
16 able to say we're developing groundwater from some
17 particular source. That can be done with sufficient
18 precision to tell that to the well owner or to tell it to
19 you, as far as when determining that you have a
20 subterranean stream channel.

21 Then we will get into the part about whether it
22 contains water and which way water flows. And that is the
23 second part of this. That, again, we collected data in this
24 state for upwards of a hundred years, more so in some places
25 than in others. There is a tremendous amount of water level

1 information that is available throughout California.

2 And thinking back to early training that I had, you
3 know, it is possible to so-call qualify that information, to
4 interpret from some knowledge of wells in which it was
5 measured or other borings into the subsurface in which it
6 was measured to know what it represents, if it represents
7 water levels in a shallow aquifer, a deep aquifer, a
8 confined aquifer, different types, and to then interpret by
9 its changes with time and how it coordinates with other
10 water level data, in which direction does water flow.

11 And from that information you can superimpose on the
12 geologic picture that I just described how water occurs in
13 the subsurface, whether or not it is connected to a surface
14 water feature and in what direction it flows.

15 MEMBER SILVA: Can I just interrupt?

16 MR. SCALMANINI: Sure.

17 MEMBER SILVA: I guess I'm trying to cut to the chase
18 here. I read -- when I read the letters from legal
19 perspective, everybody seems to be saying don't do anything.
20 Everything is fine.

21 I guess from a technical perspective, do you feel we --
22 it is worthwhile to try to come up with some technical
23 parameters or guidelines? Or do you -- I couldn't -- from
24 your appendices I couldn't tell whether you were saying
25 there was some opportunity for that or whether it should

1 just be left on a case-by-case basis. I guess I am trying
2 to cut to the chase. If you can answer that.

3 MR. SCALMANINI: Sure. I think that the global answer
4 to your question is that to try to paint California with a
5 broad brush that says there are parameters that will define
6 if you fit X, Y and Z you are in a subterranean stream
7 channel or if you don't you are not. It is not possible.

8 So it is really the case-by-case illustration, that
9 groundwater occurs in a broad variety of situations
10 throughout California.

11 MEMBER SILVA: I guess that is what I am trying to get
12 to. I think a lot of -- most of the comments were legal
13 comments. Very few technical comments. I guess if
14 everybody is saying that we do nothing, from that legal
15 perspective I can understand it. But if we are also saying
16 from a technical perspective there is little we can do other
17 than to leave it up to the individual hearings, that is
18 another comment. It wasn't real clear by the technical
19 appendices or whatever.

20 MR. SCALMANINI: A technical perspective we are trying
21 to convey is that there are key technical parameters which
22 need to be considered on a case-by-case basis. And by
23 progressively walking through them, I can stop with the
24 rest of the discussion and just say, if you walk through
25 geologic settings, water level information, well yields and

1 aquifer characteristics, to determine whether or not there
2 are boundary conditions and whether there is conductivity or
3 disconnection, and those kinds of things, and lastly
4 compliment that with a water quality override, then the
5 conclusion can be reached as to whether or not the
6 occurrence of this water fits a channelized configuration or
7 not. But you have to do it on a site-by-site or
8 case-by-case basis.

9 MEMBER SILVA: That is what I wanted to get to. It
10 sounds like you are saying that that is what you are
11 recommending.

12 MR. SCALMANINI: Yes.

13 MEMBER SILVA: Thanks.

14 MR. SCALMANINI: I'll make my closing. That is to go
15 back to the common sense parameter, that when you finish
16 looking at geology and water levels and well yields and
17 aquifer characteristics and water quality, surface and
18 groundwater quality, then, as I said at the outset, the
19 picture better look like some kind of channel.

20 But if you can't define or you have an ill defined
21 channel and with words like it's just down there somewhere,
22 well, we know it's down there somewhere. There is one down
23 there where we are standing right now. If we can't draw a
24 clear picture of it, it is not there in terms of saying
25 there is a channelized flow.

1 If we have varying water levels and flow directions, we
2 don't have a channelized condition. If we have widely
3 fluctuating water quality throughout the system, we don't
4 have a channelized system. Lastly, if we have well yields
5 on both sides of the so-called boundary that are somewhat
6 similar, and we don't have boundary conditions and
7 channelized.

8 There is one exhortation I left behind as a result of
9 saying all this would be that when you stop and finish with
10 your analysis to take a step back and look and say, "Does it
11 fit the common sense parameter? Does it look like what we
12 say it is?"

13 If it doesn't, then it's just not there. That is
14 probably the most important thing that needs to be added to
15 the site-by-site investigation.

16 MEMBER SILVA: One person's common sense could be
17 different from somebody else's common sense. That is a
18 dilemma in this whole thing.

19 MR. SCALMANINI: To an extent.

20 MR. HALL: Let me just close our presentation by
21 summarizing quickly because I think, Member Silva, you're
22 hitting on something here. When we read the questions posed
23 to the Professor Sax by the Board and then read Professor
24 Sax's lengthy and detailed report, initially the response
25 from the technical side of these was to try to develop a set

1 of impacts tests as Professor Sax laid out in his report.

2 And it was at that point into that process that the
3 attorneys reminded the group, while there is a certain
4 compelling logic to what Professor Sax is saying, it is not
5 what the Legislature has said. And as you, Mr. Chairman,
6 pointed out, it is not the Board's role to make law; it is
7 to apply the law as written by the Legislature and
8 interpreted by the courts. The law is clearly still in
9 place, that the tests established by the Legislature can
10 still be used.

11 I think the thrust of our comments are that the law is
12 pretty clear and should not be interpreted differently by
13 the Board. And that as Mr. Scalmanini pointed out, if you
14 take the modern tools that we have and you apply them with a
15 liberal dose of common sense by experts, you can distinguish
16 between water flowing in a known and definite channel versus
17 percolating groundwater. And that the Board in order to
18 properly adjudicate need not change, attempt to change that
19 test, either administratively or legislatively in order to
20 properly do this job. That is the sum of our comments, I
21 think.

22 If there are other questions, I am happy to refer them
23 to the appropriate parties to respond.

24 CHAIRMAN BAGGETT: Maybe by tomorrow there will be.

25 MR. HALL: We actually will have representatives at the

1 workshop in Ontario. It won't be the same people, but there
2 will be people there who will be able to respond to your
3 questions.

4 CHAIRMAN BAGGETT: I will probably have a couple by
5 then in any case. I read through legal law. I was reading
6 through the technical and I was reading through your legal
7 arguments, there are a couple that I would probably like to
8 discuss with someone. I want to think about them a little
9 bit.

10 MR. HALL: Okay.

11 CHAIRMAN BAGGETT: I do have one question of Steve and,
12 I guess, the attorneys here, it is the same questions I will
13 ask a lot of folks. We still have to make this
14 jurisdictional call, either staff does or the Board does.
15 And the challenge we have as you have noticed we got into
16 with staff is getting into this bifurcated hearing team mode
17 which doesn't -- which is, I think, tough on our staff as
18 well as on the Board and as well as on the parties. That is
19 not a preferred alternative.

20 So do we want to have, if you will, a preliminary
21 hearing to make a determination of whether a spring or
22 stream is, in fact, subterranean when that question is
23 raised with the Board? Or should we just let staff
24 determine? And I guess the alternative there is staff
25 becomes a witness if it goes to hearing because there will

1 have to be a hearing if it is contested.

2 So it puts our water rights division in an incredible
3 bind at times. They are asked to make a determination. But
4 then where that determination is someone is going to
5 disagree with it. So then it ends up back here. Would it
6 be easier just to do a law and motion-type hearing right up
7 front?

8 MR. HALL: I felt fairly confident that I could answer
9 your question until Anne showed up, so now I am going to let
10 her.

11 MS. SCHNEIDER: I think it is a very difficult question
12 how procedurally to deal with these sort of preliminary
13 determinations. You have an example in fully appropriated
14 stream system determinations.

15 I guess our view is that the system isn't broken from a
16 technical standpoint. But I think it is starting to be
17 broken from a legal standpoint, and the remedy is, I submit,
18 to go back to what you used to do and to pay special
19 attention to where the burden of proof lies. Usually these
20 matters of subterranean stream determinations come up either
21 as an application or as a complaint. And in either of those
22 cases it should be the applicant that has the burden of
23 proving that they're trying to pump water from a
24 subterranean stream or the complainant has the burden of
25 proving that the pumping that they are concerned about is

1 not the percolating groundwater but it is from a percolating
2 stream or subterranean stream.

3 So the burden of proof factor is really important. And
4 if you have an applicant come in and says it is from a
5 subterranean stream, then the staff may go out and do an
6 investigation and may prepare a report. And what used to
7 happen was the Board would include that report in evidence
8 and make that engineering geologist available for questions,
9 including questions from Board staff, and weigh that
10 evidence along with the evidence of the applicant trying to
11 prove it is a subterranean stream or the complainant trying
12 to prove it is a subterranean stream.

13 The change that is recent as far as we know is to try
14 to have an advocacy or permitting team within the Board's
15 own legal and technical staff to come in and make that
16 case. And that raises the issue about whether the Board can
17 be seen as a neutral adjudicator of any question. The fact
18 that it is a preliminary issue is not so much of concern as
19 the adjudicatory role of staff being mixed up with advocacy
20 role of staff.

21 I think that maybe the key is where the burden lies,
22 and it is not the Board's burden to prove that something is
23 a subterranean stream or not. It's the burden of an
24 applicant or complainant. And I don't think it is that hard
25 a question. Because up until recently you have handled it

1 that way well. You know, ACWA has asked, well, if you don't
2 like what's happened in the draft decision that is pending,
3 what about previous ones?

4 As Joe Sax says in his report, Garrapata was clear and
5 obvious. He doesn't think it is a good test case because it
6 was so clear how it applied. We think it is a great test
7 case because it was clear from a common sense standpoint and
8 made a lot of sense.

9 So I think you have to go back to a common sense use of
10 staff to give you what they believe their answer is, but not
11 in an advocacy position, but just as yet another factor for
12 you to weigh in making decision of whether it is
13 subterranean stream or some ultimate issue on a complaint.

14 CHAIRMAN BAGGETT: Thank you.

15 MR. HALL: Art, I just want to say I feel vindicated by
16 letting Anne answer the question. She did it better than I.
17 But I do want to make it clear that from ACWA's standpoint
18 it should be the Board making the determination, and the
19 process that Anne outlined we believe gets you to that
20 proper role setting for the Board and the staff.

21 Thank you.

22 CHAIRMAN BAGGETT: Andy Hitchings.

23 MR. HITCHINGS: Good morning, Mr. Chairman, Board
24 Member Silva. Andy Hitchings for Glenn-Colusa Irrigation
25 District.

1 I'm going to try to make my comments short. I did
2 submit some written comments. They are in the back. If any
3 one needs copies, they can let me know if they have run out
4 back there.

5 Generally, as our written comments state, we concur
6 with and adopt the detailed comments that have been
7 submitted by ACWA. As far as your request, Chairman
8 Baggett, for recommendations on the process that the Board
9 should follow, we'd always believe that the test should
10 continue to be whether the water is a subterranean stream
11 flowing in a known and definite channel. That is the test
12 that should be applied. It should not be the impacts test
13 that had been recommended in the Sax report.

14 And when you have opportunity to go through Appendix B
15 of the ACWA comments, I think that does give the Board some
16 guidance as to the types of factors and modern analytical
17 techniques that the Board can use in making that
18 determination.

19 As far as where the Board should go from here with
20 regard to the Sax report, we made some very specific
21 recommendation in our written comments, and I will briefly
22 go through those first. We think the Board should simply
23 acknowledge its receipt of the report, but take no action to
24 implement its recommendations.

25 Second, we believe that the Board should specifically

1 direct its staff and legal counsel that it should not cite
2 or otherwise utilize the Sax report in any administrative or
3 judicial proceedings. And you will see attached to our
4 comments a status comment statement that was filed in the
5 North Gualala case where the Sax report was, in fact, cited
6 by legal counsel for State Water Board.

7 CHAIRMAN BAGGETT: Attorney General.

8 MR. HITCHINGS: Correct. And then going back to the
9 process for further determination, we believe the State
10 Water Board can make its case-by-case determinations in a
11 given case as to whether it has jurisdiction over
12 groundwater using the factors or at least considering the
13 factors that are in Appendix B which are consistent with the
14 factors that the Board has consistently used throughout time
15 up to this point.

16 I appreciate your consideration of our comments, and
17 I'm happy to take any questions.

18 CHAIRMAN BAGGETT: Thank you.

19 MR. HITCHINGS: Thank you.

20 CHAIRMAN BAGGETT: David Guy.

21 MR. GUY: Thank you, Chairman Baggett, Board Member
22 Silva. Thank you for the opportunity to comment today on
23 the Sax report.

24 We want to be a little more direct if we can. I think
25 the State Water Board ought to simply rebuff the

1 recommendations in the Sax report. And I think, as I think
2 Andy suggested, even go a step further and affirmatively
3 indicate that this will not be relied upon in any
4 administrative or judicial context. We think that is very
5 important. Otherwise this is going to take on a life of its
6 own, and I think everybody recognizes that. That is why I
7 think you have a good attendance here today.

8 The concern, of course, is the expansion of the Board's
9 jurisdiction, and folks in Northern California that we
10 represent are very opposed to that. I think we would all
11 agree in this room that if we were going to redesign the
12 water rights system in this state or if we were going to
13 start from scratch, we'd probably do it a little different
14 than the system we have. That, of course, doesn't really
15 mean a lot, after you have 150 years of policy and economic
16 and social development in the state that's relied upon this
17 particular system.

18 Any change, of course, in the Board's jurisdiction is
19 going to, of course, radically affect people in the
20 Sacramento Valley, folks that have long relied on
21 percolating water rights. And if they all of a sudden are
22 under the jurisdiction of the Board, they presumably would
23 have some of the most junior water rights in the state. As
24 you can imagine, you are going to turn the senior water
25 rights in Northern California into junior water rights

1 without a little bit more care.

2 With that said, I think as you all are aware, we have
3 been embarking and engaged in what I think is a very
4 ambitious water management program for the Sacramento
5 Valley. And this integrated program includes a broad array
6 of things. It includes eco system improvements, water
7 supply improvements, fishing screens, fish passage
8 improvements, water use efficiency, offstream storage and,
9 quite honestly, a broad assortment of conjunctive management
10 projects. We believe that is the way, in fact, that you are
11 going to see the integration of water in the State of
12 California through these locally developed means. And that
13 is, in fact, what is going on in the Sacramento Valley. And
14 that, as you well know, is the kind of heart and soul of the
15 Sacramento Valley Water Management Agreement. We are
16 essentially going to hopefully avoid the adjudicatory
17 process of a Phase 8 water rights process, and, obviously,
18 that is what contract renewal is all about, too, is stay out
19 of this regulatory context.

20 And I think that is where we disagree very much with
21 the way Professor Sax characterized his recommendations. It
22 almost seems like to him integrated water management has to
23 take place in the context of a regulatory framework. And we
24 think that, quite honestly, in Northern California at least
25 you have a better chance of integrating the resource outside

1 of a regulatory framework. We are seeing that, and it is
2 not just a fluff; it's real.

3 So I think the bottom line is, as you heard, one size
4 does not fit all. Case-by-case basis I think is the only
5 way that you are going to be able to grapple with these
6 difficult issues. That is why the Legislature time and time
7 again has talked about local control of groundwater
8 resources, local management. Because there's never been an
9 ability through the Legislature or other means to deal with
10 this on a one size fits all. It just simply can't happen
11 for all the reasons you're well aware and that have been
12 described earlier.

13 So we believe that the Board is going to be faced with
14 a challenge of dealing with this on a case-by-case basis.
15 We understand the staffing difficulties that that poses for
16 you, but that is to me and to us the charge of the Board, is
17 to be able to grapple with those difficult issues. And that
18 is to us the way you ought to be handling this process.

19 I will stop there unless you have any questions.

20 MEMBER SILVA: Just a quick one. I guess -- wouldn't
21 you admit that Phase 8, is great by the way, was done under
22 a similar but quasi regulatory framework? In essence you're
23 deferring potential regulation through Phase 8. I mean, I'm
24 just saying sometimes people have to be forced into doing
25 things.

1 MR. GUY: People say there is a lot of regulatory
2 moving pieces out there and a lot of different forms. I
3 think that at least the Sax report almost kind of used the
4 Southern California adjudicated basin as kind of the
5 framework on which the rest of the state ought to proceed.

6 Best of my knowledge that's worked quite well in
7 Southern California. I think we've been trying to do
8 everything in Northern California so we don't get into that
9 kind of mode.

10 CHAIRMAN BAGGETT: I think that was well stated in
11 ACWA's brief. I think the difference between the San
12 Joaquin-Sacramento Valley and Southern Cal groundwater
13 basins which I think there is a lot of significant
14 differences.

15 MEMBER SILVA: The same question. So you think from
16 the technical perspective there is nothing that needs to be
17 tweaked or could be tweaked as far as some kind of
18 guidelines?

19 MR. GUY: I will defer. I'm not a hydrologist. I
20 think you heard from Joe and several other hydrologists. I
21 think they are very -- I would support everything that Joe
22 has said and the others in that regard.

23 MEMBER SILVA: Thank you.

24 CHAIRMAN BAGGETT: Thank you.

25 MR. GUY: Thank you.

1 CHAIRMAN BAGGETT: Harllee Branch, Department of Fish
2 and Game. We have received and read your comments.

3 MR. BRANCH: Good Morning, Chairman Baggett and Member
4 Silva. I'm going to take a radical left turn here and
5 express the Department of Fish and Game's support of the
6 report. We'd also like to express our thanks to the Board
7 for tackling this difficult issue. And we'd like to
8 congratulate Professor Sax for his tenacious research and
9 for doing a good job in putting the report together.

10 The Department believes this is a very encouraging
11 first step, and the Department hopes the work will continue
12 in the future so we can cooperatively come to some solution
13 that most people can live with.

14 We would initially like to express our support for
15 Sax's six recommended criteria insofar as they establish an
16 impact test. As the Board may be aware, the Department has
17 long advocated an impact-based test. While we have been
18 more favorable towards an impact test that took into account
19 resource impact, we once again believe that this is a step
20 in the right direction.

21 Our initial comments speak to the six recommended
22 criteria and you have, I believe, these comments in the
23 report, so I will try to get through them briefly.

24 In regards to criteria number one, as you are aware the
25 word "substantial" is used a couple of different times.

1 First in regards to the percentage of annual flow extracted
2 from the stream recharge area and the amount of stream
3 deletion during the critical flow period. I think it would
4 be helpful to have more clarity in regards to the meaning of
5 substantial in order to bring a level of predictability in
6 the administration of any task should it be adopted and to
7 provide better notice to interested parties.

8 The term critical flows is also mentioned. And the
9 Department understands that this term refers to the
10 interaction of stream flow on water dependent resources.
11 This isn't really laid out. Again, it might be helpful to
12 have some guidance on this.

13 There were a couple issues in criteria number two, some
14 technical issues. First there are two situations described
15 in which a limited hydraulic connection between the surface
16 and groundwater will rebut a presumption of jurisdiction
17 under criteria number one. The first of these situations
18 involves the presence of a clay layer. As stated by
19 Professor Sax, the pumping well must be separated from the
20 groundwater by a clay layer of sufficient thickness and
21 vertical length. There may be some wells that have gravel
22 packed on top, and sometimes this gravel will reach --

23 CHAIRMAN BAGGETT: So you agree with his -- I guess
24 that we are trying to, like Pete said, you agree with the
25 determinations?

1 MR. BRANCH: You have the comments and you already read
2 them?

3 CHAIRMAN BAGGETT: Yes.

4 MR. BRANCH: Then I will move on to a couple comments
5 based on what other people have said to respond to those
6 issues, if that is okay.

7 CHAIRMAN BAGGETT: Yes, that is. We've got your
8 written comments. We've read them all. The only ones we
9 haven't seen is ACWA's. We have all the rest of them.

10 MR. BRANCH: In the interest of time and the number of
11 people here I will cut to it.

12 The members of ACWA and the other speakers who were up
13 here mentioned sticking to the old task basically and going
14 on a case-by-case basis. Our agency believes that Professor
15 Sax's criteria would not take this out of the case-by-case
16 arena. It would be a case-by-case determination based on
17 different criteria.

18 And what we need here is, I think, procedurally is more
19 clarity for all people involved. And I think with these
20 recommended criteria and any work in the future we can
21 hopefully get better clarity from people involved and
22 improve the administration of jurisdiction over
23 groundwater.

24 They also, ACWA in particular, mentioned a common sense
25 test, going to a common sense test. And people can correct

1 me if I am wrong, but I believe there was a test that was
2 mentioned in the appendix of the Sax report that was a sort
3 of step by step by step by step by step test with a lot of
4 technical requirements. And I am not sure if this really
5 brings a credible amount of clarity to the issue. Fish and
6 Game's technical advisors have informed me that it is
7 virtually impossible under this test to get jurisdiction at
8 all, which creates some other problem.

9 And finally I will just conclude on the issue of the
10 fact that the Board did go by a bed and banks test. They
11 have been doing it for a number of years. But I think what
12 we are trying to get to here is the fact that we need to
13 follow what the Legislature intended. And I believe
14 Professor Sax was trying to get towards what the Legislature
15 intended with Water Code Section 1200. It seemed to me it
16 was an impact test. And in that regards our agency supports
17 using that sort of a test. And in the face of the fact that
18 a previous test has been used we need to do what is right.

19 And with that I will conclude.

20 Thank you.

21 CHAIRMAN BAGGETT: Thank you.

22 Michael Warburton.

23 MR. WARBURTON: I am Michael Warburton. I am the
24 director of the Public Trust Alliance.

25 As I said in my written comments, I represent very few

1 organizations and a very old agenda. We advocate
2 responsible stewardship of public trust resources for the
3 benefit of future generations as well as ourselves. We see
4 the Public Trust Doctrine as a very valuable and time-tested
5 institutional framework for making the right decisions to
6 protect the long-term public values when short-term
7 pressures might make us lose touch with the common sense to
8 protect our most essential resources. I'm seeing that my
9 common sense is different from other people's common sense.

10 We are particularly happy to endorse the impact test
11 which Professor Sax has concluded is the original basis for
12 state management of groundwater. We now have all too many
13 situations in California where surface waters completely
14 vanished because of groundwater mismanagement. The legal
15 disconnect in the treatment of two aspects of what we
16 increasingly see as a continuum of a single resource is
17 growing more brittle and untenable every day.

18 It is no longer tolerable to try to maintain a
19 misleading fiction of subterranean streams which bears no
20 relation to the experiences of either the pumpers or the
21 public which relies on the State Board to protect our
22 state's water for public purposes. We are more than glad to
23 support the Board in this effort. We are here today to say
24 publicly that we will be working with other organizations to
25 ensure that no more public assets are illegally gifted to

1 private actors without application of a fictional division
2 between percolating groundwater and subterranean streams.

3 And thanks very much for the opportunity to comment on
4 Professor Sax's very practical analysis of historical
5 materials related to this question.

6 CHAIRMAN BAGGETT: Thank you.
7 Eric Robinson.

8 MR. ROBINSON: Good morning, Chairman Baggett, Member
9 Silva. My name is Eric Robinson. And I am here today on
10 behalf of the law firm of Kronick, Moskovitz, Tiedemann &
11 Girard.

12 We have many clients, cities, farmers, all kinds of
13 water districts, other property owners that would be
14 affected by a change in how the State Board defines the
15 scope of its water right permitting jurisdiction over
16 underground water. When we see the report on the legal
17 classification of groundwater by Professor Joseph Sax as a
18 step in the Board's continuing efforts to understand the
19 scope of its legal authority and the authority that the
20 Legislature provided, and although the report's an important
21 contribution in this sort of odyssey, we recommend that the
22 Board not adopt the recommendations in the report and that
23 the Board direct its legal staff and its technical staff not
24 to rely on or to cite the report in any administrative or
25 judicial proceeding.

1 The reason for this is twofold. First, the report
2 recommends that the Board change its administrative test
3 from one of underground water subject to its permitting
4 program, and it does so in a way that would disregard the
5 test the Legislature originally enacted in 1913. The
6 Legislature specifically considered and rejected a proposed
7 water right permit program that would have covered
8 underground water. And it drew a line segmented that water
9 underground which is not subject to permitting and that
10 which was. That which is is a subterranean stream flowing
11 in a known and definite channel. And the words the
12 Legislature enacted define the scope of this Board's
13 authority now in 2002.

14 The Sax report says the Board should instead require
15 water right permits for all wells, and this is just the
16 thrust of the report, that have an impact on surface
17 stream. As others have said this morning, even if that
18 approach has some academic appeal, if one was designing from
19 whole clothe a water regulatory and water rights allocation
20 system for the state, we are not working with whole clothe
21 here. The Legislature didn't say require permits for all
22 wells that have impacts on surface streams, for all wells
23 within a thousand feet of a surface stream recharge area or
24 all wells within the hundred year floodplain. Only
25 subterranean streams.

1 The second reason we ask the Board not to adopt the
2 report's recommendation or have its staff rely on it arises
3 from its recommendation essentially that the Board make an
4 end run around the Legislator's circumscribing the Board's
5 permitting power; and to do so by invoking the authority the
6 Board says arises from Water Code Section 275 and the Public
7 Trust Doctrine and Article X, Section 2 of the state
8 constitution to in effect establish a de facto groundwater
9 permitting program through administrative enforcement
10 actions.

11 The Board's authority to take direct administrative
12 action to restrict the use of groundwater is limited to
13 narrow circumstances set forth in the Water Code. Beyond
14 those narrow circumstances, the Board is authorized only to
15 ask the California Attorney General to bring legal actions
16 seeking court remedies for disputes involving underground
17 water that is not a subterranean stream. Water Code 2100,
18 et seq., is a prime example of that.

19 There the Legislature specified that court actions are
20 the mode for the Water Board to regulate percolating
21 groundwater where water quality is an issue. That mode is
22 the measure of the Board's power. If the State Board uses
23 direct administrative enforcement actions to circumvent the
24 limitation on its permitting jurisdiction over groundwater,
25 it will be exceeding its legal authority. The written

1 comments of the Association of California Water Agencies
2 provide a good, detailed response to the Sax report. And
3 Kronick, Moskovitz joins in most of those comments and
4 wishes to emphasize an additional practical point.

5 If the State Board expands its water right permit
6 program as recommended by Professor Sax, the water supply
7 for thousands of Californians in cities and towns across the
8 state, it may be jeopardized. This is because municipal
9 water supplies are appropriative in nature. That is the
10 kind of water right they are. And if we require permits for
11 all of the wells, for example, that all the little coastal
12 towns and cities have in alluvial valleys reaching out into
13 the ocean, the people who live in those towns are going to
14 have to run the gauntlet of a permit processing procedure
15 that involves California Environmental Quality Act review,
16 minimal bypass flow imposed under the Endangered Species
17 Act, et cetera. The uncertainty that will arise from
18 applying the permit program is going to harm those cities,
19 it is going to stifle the economic investment and
20 development in those areas. It will harm Californians.

21 So, in closing, we recommend that the Board not adopt
22 the recommendations and direct staff not to rely or cite
23 those recommendations in any administrative or judicial
24 proceeding.

25 Thank you.

1 CHAIRMAN BAGGETT: Thank you.

2 Alan Lilly.

3 We have received your comments. And I must compliment
4 you. It is probably one of the most succinct discussions
5 I've read of statutory construction and how the Supreme
6 Court and state views it. Very clearly laid out.

7 MR. LILLY: Thank you. And that was my first question,
8 whether or not you have. I will put the remaining copies I
9 have here on the back table. I do appreciate your comments
10 on that.

11 Chairman Baggett and Member Silva, members of the
12 Board and staff, my name is Alan Lilly from Bartkiewicz,
13 Kronick & Shanahan here in Sacramento. We represent
14 numerous water purveyors throughout California.

15 I would like to, first of all, thank the Board,
16 particularly Chairman Baggett, for organizing this process
17 and for allowing public input. I think the concept of
18 calling a timeout a couple of years ago and trying to assess
19 where we are has been very valuable. Certainly it's been
20 time consuming, but productive. I also would like to thank
21 Professor Sax. I don't think he is here today, but I think
22 he has done a very good job of going through the extensive
23 history. He makes it look easy, but we all know full well
24 it is not easy to reconstruct history from a hundred years,
25 particularly in the level of detail that he has done.

1 However, like the ACWA comments, I also have to object
2 to the proposed impact test from Professor Sax's report as
3 not being based on the statutory language that we all have
4 to live with and being consistent with that. As I have
5 said in my letter, I will not go into any detail on that
6 because you obviously have it in front of you.

7 The case law just simply does not allow the Board or
8 the courts, even for that matter, to ignore statutory
9 language. Even if they think they got what the Legislature
10 really had in mind, really intended in mind, they still
11 can't do it. You have to go to the Capital and get the
12 legislative language changed, and it is going to go that
13 way. And it really is a policy question. Frankly, it would
14 be a very lively policy discussion in the capital properly
15 and not before this Board.

16 Chairman Baggett, I am just going to go right to your
17 question that you asked first off this morning before anyone
18 made any comments. What should we do? I think that really
19 is where we are and where we have to try to collectively
20 figure out where we go from here.

21 I think the Board has to adopt some regulations
22 addressing this issue. I say this with a little bit of
23 trepidation because I obviously highly respect Joe
24 Scalmanini, his expertise and his comment that it's going to
25 be very difficult to come up with a set of regulations that

1 can apply everywhere in California. We just have so much
2 variety in geology and hydrologic conditions throughout
3 California. So I am not suggesting that you adopt a
4 regulation that says if a well is within X feet of a surface
5 water stream it's jurisdictional or not.

6 It would be nice if we could because then we could all
7 just go home and wouldn't ever have to talk about this
8 anymore. We'd know what wells were in the jurisdiction and
9 which ones were not. Practical reality just doesn't allow
10 that.

11 Nevertheless, I think the Board needs to set out a
12 process, what factors will be considered in making the
13 jurisdictional determinations. I think both Appendix A and
14 Appendix B to the ACWA comments are a good start in that
15 direction. They talk about the criteria that the Board
16 needs to consider. I think something along those lines
17 needs to be formalized. I'm very concerned if it is just
18 done on a case-by-case basis, frankly, it will be many
19 years, if ever, before somebody with a well knows whether or
20 not they need to apply for a permit. I think the Board
21 really owes it to the well owners throughout California and
22 people thinking of drilling new wells to have some idea of
23 what process is going to be used to determine whether or not
24 they need permits.

25 Obviously, the process and the factors that should go

1 in those regulations should be based on determining the
2 question whether or not the groundwater is in a subterranean
3 stream flowing through a known and definite channel because
4 that is the statutory language and not on the type of impact
5 test that Professor Sax has proposed.

6 Finally, Chairman Baggett, I will just conclude with
7 this: I realize there is a real quandary here. Because of
8 the way the Board is set up, applications first come to
9 staff. They have to decide whether or not to file them,
10 issue notices and accept protest and all that. And yet the
11 determination of jurisdiction ultimately has to be a Board
12 decision. It can't be a staff determination because it is
13 such an important issue and involves legal policy, technical
14 questions, that it's ultimately going to come to the Board.

15 So I think that the Board needs to look at a process.
16 First of all, having regulatory criteria to apply should
17 help. We'll all know where we stand better. There still
18 will be some cases on the line, the gray area. We know
19 that. But I think for those the Board needs a process where
20 those issues can be resolved before the whole issue of
21 whether or not to grant the permit, whether that is in
22 public interest and all that, goes forward. Because
23 otherwise we could spend years on protest, protest
24 resolution, and then ultimately go back to square one and
25 say, "Well, the Board really didn't have jurisdiction in

1 this case," and all that work was for nothing.

2 Just in summary, I think we need regulations discussing
3 criteria that are going to be used for the jurisdictional
4 determination and also a procedure for how that
5 determination can be done up front.

6 Again, I do thank you and Professor Sax for the time
7 you put into this. A lot of progress has been made. We are
8 not done yet, but I think we are making a lot of progress.

9 CHAIRMAN BAGGETT: Thank you.

10 MR. LILLY: Thank you.

11 CHAIRMAN BAGGETT: Joel Moskowitz.

12 MR. MOSKOWITZ: Chairman Baggett, Mr. Silva, I'm here
13 representing the City of San Bernardino Municipal Water
14 Department.

15 I would like to turn directly to Professor Sax's
16 recommendations. I was considering over the last couple of
17 days what kind of advice I would give you and how I would
18 summarize my some 23 pages I --

19 CHAIRMAN BAGGETT: The butterfly wings, the laughing of
20 the butterfly wings that caused the hurricane.

21 MR. MOSKOWITZ: We hoped you'd enjoy that. Anyone else
22 who didn't see that, we didn't bring it up here, but you can
23 contact me and I'll give you one.

24 I was considering how to summarize this and what kind
25 of advice to give you in terms of these recommendations

1 Professor Sax has made. It occurred to me suddenly I don't
2 have to give you any advice about whether or not to adopt
3 Professor Sax's recommendations because you won't do it.
4 The reason you won't do it, I know this from having
5 represented this Board in court for ten years. Your lawyers
6 aren't going to let you do it. Because what he is telling
7 you is to forget about the language of the statute and
8 enact the intent.

9 I'm picturing myself back many years as deputy attorney
10 general trying to defend that regulation. "Well, your
11 Honor, it completely contravenes the word of the statute,
12 but I know it somehow represents the intent." That is not
13 going to happen.

14 And so you turn to the next recommendation that somehow
15 Section 275 of the Public Trust Doctrine and the Reasonable
16 Use Doctrine be invoked. I was looking forward to the ACWA
17 paper which I did get earlier than you did trying to find
18 out what that meant. I confess in my paper I hadn't a clue
19 what that meant or how it would impact surface stream users.
20 And I gave up and I think ultimately they gave up. The same
21 with the basinwide jurisdiction.

22 So why did I bother to show up here today to tell you
23 not to do something you are not going to do? The reason is
24 because I think Professor Sax's report has a danger of
25 being something like the Cheshire cat, that after we're done

1 flagellating everything that he says, all of its substance,
2 still the smile remains. And what I am concerned about,
3 although I endorse the case-by-case approach that ACWA sets
4 forth, I think that it is very important what lens you use
5 as you adjudicate case by case.

6 If, in fact, what the Board wants to do is to adopt an
7 impact test instead of the old tired, as we are told, bed
8 and banks approach, I think that will influence the kind of
9 decisions you make. So we are urging you not to look
10 through that lens. It is a tough thing to do to try to
11 address the Board's perception of the world, and I know that
12 with the best of intent and the best of staff you sometimes
13 properly feel you can do a better job than the courts do or
14 might be done without your intervention. It is a real
15 problem.

16 The real problem exists that this statute was enacted
17 in 1913. We have a whole society, a whole economy that's
18 grown-up. If you simply declare anything that was
19 previously thought reasonably as groundwater as suddenly
20 surface water, as other people will tell you who will follow
21 me and preceded me, you are going to have a lot of
22 dislocation. Only the Legislature can protect existing
23 uses.

24 Let me turn to what you should do. First of all, I
25 want to endorse what Anne Schneider said. It has to be case

1 by case, and your staff very importantly should not be put
2 in an adjudicatory role. While I don't want to comment upon
3 the hydrogeology because I'm not a hydrogeologist, I would
4 want to tell you that I understood fully what was said by
5 Mr. Scalmanini that untrue underground streams are very
6 rare, very rare. It is a very narrow exception. And that
7 exception should not be allowed to become anywhere near the
8 rule. Because it is a narrow exception, I think what Anne
9 said about the burden of proof really strikes home, that
10 anybody who says that something is an underground stream
11 ought to have the burden of proving it. I think that it is
12 the essence of her comment and in essence that is the
13 comment that the City would adopt as well.

14 Thanks so much.

15 MEMBER SILVA: Thank you.

16 My role of Vice Chair here.

17 Tim O'Laughlin.

18 MR. O'LAUGHLIN: Good morning, Mr. Silva. Tim
19 O'Laughlin speaking on behalf of the San Joaquin River Group
20 Authority.

21 You have our comments. You have had an opportunity to
22 read our comments. I just want to go to the question that
23 was asked earlier. I endorse what Mr. Moskowitz said and
24 what Ms. Schneider said about where we need to go from
25 here, and elaborate on a point that you made about common

1 sense.

2 Unfortunately, we have a test, and the test is a
3 difficult test. It is not an easy test. But like with all
4 legal tests ultimately the decision rests in your hands. And
5 what I mean by that is you are the trier of fact and you
6 apply the law to the facts. So in each specific case that
7 you will have in front of you, you acting in your
8 adjudicatory mode will have to respond to those specific
9 cases and suppose specific facts.

10 What I've heard today is a lot of mashing of teeth
11 about, "Well, gee, we are not going to know if we are going
12 to have jurisdiction until we have jurisdiction. Should we
13 have our staff do jurisdiction and where do we go?" I'm
14 going to speak from the lawyer's side of things rather than
15 a public policy side of things.

16 Jurisdiction is in every case. Jurisdiction is a
17 starting point in every case and jurisdiction is always an
18 issue in every case, and it will not go away. As you well
19 know, Chairman Baggett, jurisdiction can be raised at any
20 time. What you are really asking here is how we should
21 address the jurisdictional issue. Well --

22 CHAIRMAN BAGGETT: That is what I am asking.

23 MR. O'LAUGHLIN: My point of this is plainly this: your
24 staff should not address it. The issue as Ms. Schneider
25 raised is an issue for the parties to put in front of the

1 trier of fact. You will determine whether or not you have
2 jurisdiction, and you will exercise the jurisdiction based
3 on the facts in front of you and the application of the
4 law. If the parties have a problem with that and they go
5 off on appeal based on a writ of mandate on your application
6 of those facts of the law, and let's say an appellate court
7 finds that there is no jurisdiction, well, unfortunately
8 that is the way our system works.

9 I have been in numerous cases before where we've had
10 trials lasting two to three weeks, taking two years to do
11 the discovery, and unfortunately when we've all been done
12 and gone up on appeal, we found out, lo and behold, the
13 lower court didn't have jurisdiction. Unfortunately, that
14 is the way our system works here.

15 So what I'm trying to say here today is we have a
16 test, and you have to apply that test and your staff
17 shouldn't do it. And not only that, but the burden of proof
18 should be properly put on the parties that are asserting
19 whether or not they have or -- that you do or don't have
20 jurisdiction.

21 The other thing I would like to say is you do not need
22 regulations for this. While the appendices to the ACWA
23 brief are interesting, why they may lend you some help in a
24 particular case in fashioning whether or not jurisdiction
25 applies, they basically are irrelevant. We do not endorse

1 them. We believe that the State Board, acting on a
2 case-by-case basis with the experts in front of it and with
3 the facts in front of it, will properly apply the
4 jurisdictional test.

5 And finally I have one other thing to say. The Sax
6 report, and I have listened to comments from California
7 Department of Fish and Game and others, I think it is pretty
8 clear to see from the Sax report that was done that there is
9 a schism that is in front of you. There are those where
10 the test is what the test is and then there is a view that,
11 well, that is a test but it is really not the intent. We
12 need to move beyond that.

13 We would endorse the ACWA comments on this point and
14 the other comments that were made by Mr. Moskowitz and Mr.
15 Lilly, and you saw in our response. We view the Sax report
16 as going as on a wish list of things that we would like to
17 be done and would like to be seen, but it is really not what
18 is and is in front of you now.

19 If you have any questions, I would be happy to respond.
20 You have our report in front of you.

21 CHAIRMAN BAGGETT: Yes. Like a historical novel is
22 popular. I do have a question.

23 MR. O'LAUGHLIN: Sure.

24 CHAIRMAN BAGGETT: In terms of if the Board will make
25 the jurisdictional determination, does it need to be a full

1 Board or can it be a hearing made, a hearing officer, a
2 small -- it should be a relatively short hearing. It
3 shouldn't go on for weeks whether it is jurisdictional on
4 subterranean stream or not.

5 MR. O'LAUGHLIN: Well, you --

6 CHAIRMAN BAGGETT: I guess a system that we are looking
7 at will probably do with a staying issue on a stay in water
8 quality matter, is the hearing officer will be delegated
9 authority by the Chair to make the determination so we don't
10 have to wait three months or six months for the whole Board
11 to come back and deal with, say, a stay issue in a water
12 quality petition. It could be determined relatively
13 quickly.

14 And as you know, anything has to come back to this full
15 Board, it takes more time. It is more reports. It's a
16 whole other workshop, a whole other -- you are doing the
17 same issue now for the third time.

18 MR. O'LAUGHLIN: That is the procedural problem. I
19 understand your staffing limitations. I understand the time
20 issues involved. But let's hypothetically assume that you
21 have a bifurcated hearing.

22 CHAIRMAN BAGGETT: No. I'm proposing that what I've
23 proposed for argument is if Vice Chair Silva, he was
24 assigned, he was doing a subterranean stream determination
25 hearing by two parties before this Board, and then basically

1 I would delegate him the ability to make that determination
2 so that it doesn't take us months to come back to the full
3 Board like a normal water right order, because, I guess, it
4 is a preliminary matter.

5 So the question is is a jurisdictional matter like that
6 preliminary -- full appropriated streams to me, the issue
7 seems the same, similar. Having done one of those and
8 getting ready to do two more, it is something that the
9 threshold is pretty straight forward. The real battle is
10 going to be if it is not appropriated, who gets what. That
11 could take months. But just the preliminary determination
12 among whether the stream is appropriated or not is something
13 that shouldn't take a year and a half for this Board to get
14 the answer back from the parties, it seems to me. It just
15 does because of the way the process has been set up.

16 I'm proposing with a shorter process for a hearing
17 officer, much like a law and motion calendar in civil
18 practice, where it is quicker.

19 MR. O'LAUGHLIN: As you well know, in civil practice
20 there are means by which courts can, on demurs and motions
21 to strike, judgments on the pleadings as well as motions for
22 summary judgment, get to the heart of the matter on
23 jurisdictional issues maybe without a fully contested
24 hearing. But even in those cases, as you well know, like if
25 a federal court 12(b) motion is brought to ascertain whether

1 or not there is jurisdiction, even if the court determines
2 that the motion is denied, even when you go to trial and the
3 facts are then fully before the court, you can make a motion
4 for jurisdiction, at which time you may be out anyway.

5 My point to you you go to an expedited fashion to hear
6 whether or not there is jurisdiction in the first instance.
7 I think you would be -- you must remember that even when the
8 fact comes before you as a full Board, you will still be
9 faced with a jurisdictional question maybe. Because in a
10 very short hearing you don't have in front of you all the
11 facts that may be determinative of whether or not you are
12 within the bed and banks. That is really the problem. So I
13 would see -- I don't see wherein the first instance if you
14 are trying to set up something in that regard, because then
15 you have a problem with burdens of proof, who has the
16 burden of going forward, bifurcate, then you are going to
17 hear the issue anyway.

18 CHAIRMAN BAGGETT: Thank you.

19 MR. O'LAUGHLIN: Thank you very much.

20 CHAIRMAN BAGGETT: It is a grappling process and
21 procedure.

22 Who's next?

23 Ernest Perry.

24 We still have a number of cards. I guess, if you do
25 agree with what someone said before that would certainly

1 help.

2 MR. PERRY: I had submitted a short discussion.

3 CHAIRMAN BAGGETT: We got that, got your letter.

4 MR. PERRY: I guess I am here to -- I'm the community
5 development director for the County of Del Norte, which
6 involves my role as everything from building and planning,
7 engineering, public works, airports, flood control, and a
8 couple of water systems.

9 But as Del Norte County is on the periphery of the
10 state, we tend to be on the periphery of issues. We receive
11 over 80 to 120 inches of rainfall a year, and we are the
12 Smith River Basin. The Smith River has no impoundments or
13 diversions of water. So, therefore, all of our potable
14 water, none of our agricultural water relies upon weather.

15 In reading the report I actually became more concerned
16 about the implementation of it and see the potential
17 implementation as onerous to small property owners.
18 Approximately one-third of our population derives its water
19 from public water systems that use wells. The other
20 two-thirds are individual wells.

21 My experience in dealing with individuals is more
22 difficult than dealing with regulated systems. And I would
23 be very concerned in any new process that would be
24 implemented would discourage people from obtaining well
25 permits. We have gone through that in our county. We have,

1 I think, among the cheapest permit rates in the state. And
2 of those on-site sewage systems and on-site well systems we
3 almost give them a permit to encourage them to come down and
4 apply for it.

5 Irrigation for agricultural purposes is important. We
6 rely upon wells. We have a very productive anadromous
7 fisheries and, therefore, diversions from the stream, I will
8 be polite and say, are discouraged. I don't use the word
9 "prohibitive," but they can be difficult enough. So it is
10 usually cheaper and more expeditious to drill a well.

11 I am concerned about the potential process that you
12 might implement. And our remoteness from the nearest water
13 resources office, which is in Red Bluff, which is, if you
14 observe the posted speed limits, a six-hour drive from Del
15 Norte County. Since this is going on record, it took me
16 seven hours to get here by driving since I did observe all
17 the posted speed limits.

18 CHAIRMAN BAGGETT: We will record it for the Board of
19 Supervisors.

20 MR. PERRY: I will be glad to respond to any questions.
21 If you have any questions that your staff would like to send
22 to me about the process, I will be glad to respond.

23 CHAIRMAN BAGGETT: Remember, there are advantages to
24 being seven hours away from Sacramento.

25 MR. PERRY: It is kind of nice to be here in the

1 southern part of the state every once and awhile.

2 CHAIRMAN BAGGETT: You have this river up there that
3 comes out of Oregon. Thank goodness it is Oregon's problem,
4 at least at this point, the Klamath.

5 Thank you for making the trip.

6 Allen Short. About 35 minutes from Modesto, isn't it?

7 MR. SHORT: Depends on how you drive. Depends if the
8 fast lane is open, sir.

9 Mr. Chairman, thank you very much. Board Member Silva,
10 thank you as well. My name is Allen Short. I'm the
11 general manager of Modesto Irrigation District, and I'm
12 speaking on behalf of them today.

13 I'll be extremely brief. You have our letter, and you
14 will have my written comments as well. But I think I am
15 uniquely qualified to speak on this issue because the
16 Modesto Irrigation District has both groundwater rights and
17 surface water rights. Protecting groundwater rights and
18 surface water rights, as you know, is a very complex issue.
19 It means more than just stopping wells from draining a
20 stream from below or stopping surface water appropriations
21 from interfering with the recharge of an aquifer. I think
22 the key point, though, for us is like any property right. A
23 water right's value is its stability. Certainly that is the
24 key for us from that perspective.

25 Professor Sax argues that the Legislature did not

1 correctly express its intent in 1913, and 89 years
2 afterwards the Board should have taken action to broaden its
3 jurisdiction of issue permits for groundwater
4 appropriations. I'm not going to argue with history, and
5 I'm not going to argue whether the Board has the
6 jurisdiction to do that or not. But what I am here today to
7 say is this:

8 Since 1913 there's millions more Californians that have
9 moved into this state. Forty percent of their water is
10 derived from the ground. We've built an economy and society
11 that has been built on the reliance of and the legitimacy
12 and stability of groundwater rights. Whether the Board
13 could create a better system or a better system to protect
14 its licensing by inserting its jurisdiction over groundwater
15 appropriations beyond the traditional underground streams is
16 beside the point. Any such attempt that the Board will
17 undertake will fail.

18 The real issue here is the Board simply declare that
19 any of what it thought of as groundwater is really surface
20 water. It also is saying that the most senior water rights
21 holder has no rights at all unless it receives a license.
22 And being a senior water rights holder on a river, you can
23 imagine our intent and our interest in that.

24 This would also mean that all individuals would be
25 junior to the most senior surface right holder, and, again,

1 big concern for us. Any such reforms, if they are reforms,
2 should come from the Legislature.

3 And in conclusion, I would certainly urge the Board not
4 to take any action at all because you know come the end of
5 the day who is going to ultimately benefit from this, my
6 good friends that are behind me that are attorneys.

7 Thank you for your time, and I will entertain any
8 questions.

9 CHAIRMAN BAGGETT: Thank you, Al.

10 MR. SHORT: Thank you.

11 CHAIRMAN BAGGETT: John Williams.

12 MR. WILLIAMS: Mr. Baggett, thanks for having the
13 workshop. And I join others in thanking you for getting
14 this process underway and for having Professor Sax. I think
15 this has brought us a long way from the workshop in April of
16 2000.

17 I found myself in a peculiar position in agreeing in
18 part with ACWA. It does seem to me that Professor Sax has
19 given you very reasonable recommendations. As I read the
20 report, I have to have the feeling that in trying to be
21 reasonable he's been a little creative in his reading of the
22 historical record. I don't like saying that, but I think it
23 is the truth so I think I ought to say that.

24 On the other hand, I don't think the historical record
25 is as comforting as some people may think. If we are going

1 to look at the legislative intent in 1913, as Professor Sax
2 I think properly tells us we should, then we need to look
3 beyond Pomeroy. We need to look at the things that happened
4 between Pomeroy, which was 1899, and then 1915 when the act
5 was passed.

6 There were a number of cases that came up in that time
7 and there were also a number of USGS reports and probably
8 other hydrogeological studies that presumably the
9 Legislature knew about and was taking account of in passing
10 legislation. And really the critical case that I have
11 raised before is Los Angeles versus Hunter. And that came
12 up in discussion in the hearing records that Professor Sax
13 found. In referring to that, I think Mr. Short said, the
14 decision of the court and of the state have been as wide as
15 the human mind can go in describing stream flow, and in
16 context it was clear that he meant subsurface stream flow.

17 That case is an extension of Pomeroy that extended the
18 holding about the flow, subsurface flow of the Los Angeles
19 River to essentially the whole eastern half of the San
20 Joaquin Valley. It was described in the Palace proceedings
21 for that case as being the subsurface stream of the Los
22 Angeles River which subterranean stream is 10 to 12 miles
23 wide and about six to eight miles long. That is a very
24 extensive concept of what a subterranean stream was. And I
25 think it is pretty clear from Mr. Short's comments and

1 hearing that the Legislature was quite cognizant of that
2 decision.

3 So what should you do? My recommendation to you is to
4 duplicate your success with Professor Sax's report and find
5 a competent, independent groundwater expert, probably a
6 professor, who can look at the historical record from the
7 early part of the century and try to give you better
8 technical guidance about the kinds of criteria that people
9 had in mind at that time, and that can be developed from the
10 cases that the court considered during that period,
11 particularly Los Angeles versus Hunter. That is, hire
12 somebody to go back and look at the administrative record
13 for Los Angeles versus Hunter, look at the testimony entered
14 in that case and try to draw from that criteria that are
15 sensible in modern terms and that can be applied.

16 It can also look at some of the USGS reports that were
17 done in the area at the same time to get an understanding of
18 the concept that the scientists had at the time of
19 streams. I quoted some of that in my comments that you
20 have. Then we will have something that we can have some
21 more hearings, some more workshops, to discuss that and try
22 to develop some criteria that the Board staff can rely on as
23 well as lawyers can rely on and others can rely to make
24 sense of what stream wells are jurisdictional and what are
25 not.

1 I have some sympathy with the idea of trying to come up
2 with one size fits all kind of recommendations are not going
3 to be working. I do think it would be very helpful to have
4 their guidance about what fits and what does not fit that is
5 available now. I think looking at that historical record
6 would be the legally soundest way for you to do that.

7 I want to make a couple of other comments. One is that
8 a lot what I have heard said today seems to ignore the
9 Public Trust Doctrine and the Board's obligation under that
10 doctrine to protect public trust resources. And simply
11 leaving it to parties to bring cases up about diversions
12 from -- unpermitted diversions from subterranean streams,
13 would really not meet the Board's obligation under the
14 Public Trust Doctrine.

15 CHAIRMAN BAGGETT: I think the public trust -- I
16 probably should have said this in opening comments. I think
17 in fairness it really wasn't one of the questions we raised,
18 and we haven't -- I think that was raised by a few of the
19 letters. I think ACWA raised it and a number of other
20 folks. It wasn't something we asked people to comment on.
21 It just appeared. So I really don't think --

22 MR. WILLIAMS: I'm not adverse to the Section 245
23 language.

24 CHAIRMAN BAGGETT: 275? But he discussed it at length.
25 That is a separate day's discussion as far as I am

1 concerned.

2 MR. WILLIAMS: But if somebody is diverting water from
3 a surface stream without a permit, you clearly have a
4 obligation, if you know about it, to do something about it.
5 It seems to me that if somebody is diverting water from a
6 subsurface stream without benefit of a permit, you have --

7 CHAIRMAN BAGGETT: Any sense of subdebating, and I
8 don't even want to -- that is a whole other hearing,
9 workshop, as far as I am concerned.

10 MR. WILLIAMS: The other thing, and I will close with
11 that, is that a number of people have raised a specter of
12 terrible things happening if you -- if the Board recognizes
13 jurisdiction that I think that it had ever since 1914, but
14 has usually not asserted, there have been claims that the
15 sky would fall, one thing and another.

16 Five years ago you made a finding that California
17 American Water Company was diverting water from the Carmel
18 River without the benefit of a permit and up to now people
19 are still drinking water, flushing toilets under somewhat
20 more restriction than they were before. So we are getting a
21 somewhat better balance of instream and consumptive uses.
22 Certainly there has not been any kind of disaster there.
23 Some of the concerns raised here are simply overblown.

24 Thank you.

25 CHAIRMAN BAGGETT: Thank you.

1 closely at this 100 and 275 powers. You have to read 1200
2 to get to the 100 and 275 powers.

3 I have seen Dr. Sax's ideas about how to deal with the
4 groundwater, surface water issue. I think most of those
5 issues disappear when you get into the whole reasonable
6 standard which you don't necessarily have to look at. You
7 have to understand when you use those 100 and 275 powers
8 politically all hell breaks loose. We had hearings in
9 Northern California. The hearings got so bad in Northern
10 California during the lead-up to the People versus Forni
11 decision that it took the whole hearing process down to San
12 Diego so nobody could get there. In fact, at that time we
13 didn't have as much airplane service.

14 You can learn a great deal of what happened from Forni.
15 That case guaranteed a lack of conflict in the development
16 of the grape industry over the water industry. We probably
17 wouldn't have a significant grape industry in California if
18 the State Board hadn't gotten in there and done something
19 about it. The one thing that I think is really important
20 that you are asking for solutions to your problems, easy
21 solutions. I think one of the previous speakers' comments
22 about jurisdiction is totally right. You can make a
23 preliminary decision on a law and motion-type decision on
24 jurisdiction. Suddenly when all the facts start to come
25 out, it is going to turn out that that decision is wrong.

1 That bifurcated concept is fine for part of it, but it may
2 turn out to be wrong when you go through the whole hearing.

3 I think you have something in place right now that you
4 should really emphasize and have further use of and that is
5 your 5100 procedure under Water Code Section 5100 and 1010.
6 If you can get a database of all the water resources in the
7 state and force people to put that database in place, you
8 are going to be able to quickly start to develop reasonable
9 water uses. I think that should be where you should aim
10 with your database.

11 The forms that you've actually developed over the last
12 two years go a long way towards doing that. I think that
13 those are very important. You should not underemphasize the
14 importance of Section 5100. You can rewrite those forms
15 administratively to force people to declare their
16 groundwater usage as well as the surface usage because
17 nobody actually knows which is which.

18 The final conclusions, and I think this is probably the
19 most important thing that I can say, we spent a fortune on
20 engineering when we were doing the People versus Forni
21 stuff, the staff did and all the parties to the hearings,
22 spent a fortune. That same investment was going to have to
23 be made because technology is so much better. I think you
24 can use the technology skills of the state to solve a lot of
25 that water problems. You should think in terms of using as

1 much of the technology skills as possible. If we can have a
2 state database with some concept of what is a reasonable
3 water use throughout the whole state, we would be
4 significantly -- the state's water resources would be
5 significantly better protected, and you'd view third parties
6 from the outside, you'd be a lot happier in dealing with
7 investments in the state of California.

8 Thank you.

9 CHAIRMAN BAGGETT: Thank you.

10 Bill Baber.

11 MR. BABER: Thank you, Chairman Baggett and Board
12 Member Silva. Appreciate all the effort that both of you
13 and the Board has put in to reviewing this issue. I know
14 it's big, and I'm at the end here giving comments, so
15 everything has been said that pretty much I want to say.

16 So I am going to just go through and tell you that I
17 support ACWA comments on behalf of our clients. We
18 represent probably 30 agricultural domestic water purveying
19 entities in the Central Valley. Particularly we support the
20 comments made here by Anne Schneider. I think dealing with
21 the jurisdictional issue, which I know is a real tough one
22 for you to deal with, should be put on the applicant or the
23 complainants in this type of process. And the Board, of
24 course, would be the final adjudicator, final determiner, of
25 the process.

1 What else should you do? It's been said and we support
2 the comments of Andy Hitchings as to what should be done.
3 Dave Guy, Alan Lilly. We don't think the Board should adopt
4 regulations. Joel Moskowitz, Tim O'Laughlin, Allen Short,
5 and I think that's it. And you have our comments. So you
6 know where we stand.

7 CHAIRMAN BAGGETT: Well done. Thank you.

8 I think this job's easier than the executive officer
9 of ACWA is.

10 Anyway, Steve Chedesyer.

11 MR. CHEDESYER: Good morning. I want to start off by
12 saying I am neither an attorney nor geologist,
13 hydrogeologist. Hopefully that will be a little bit
14 easier. You won't ask me such detailed questions.

15 Again, good morning. My name is Steve Chedesyer. I am
16 the executive director of the San Joaquin River Exchange
17 Contractors Water Authority, and that consists of four
18 districts, two public agencies and two mutual water
19 companies. These four entities irrigate and form
20 approximately 240,000 acres in the central San Joaquin
21 Valley, and their predecessors have done so essentially the
22 same since the late 1800s. We have submitted our written
23 legal comments on Professor Sax's report.

24 And in those comments we take issue with several
25 elements of the report, and we urge the Board not to expend

1 its jurisdiction over groundwater. The purpose of my
2 comments today is to focus on conjunctive use nature of the
3 exchange contractors service area and as a policy decision
4 to encourage the Board to recognize that conjunctive use
5 service area the Board would be better to defer to local
6 groundwater management.

7 As you are aware, the exchange contractors have
8 pre-1914 riparian water rights, and they have agreed not to
9 exercise those rights so long as they receive delivered
10 waters from the Bureau of Reclamation pursuant to the terms
11 of the exchange contract, which you may not be as familiar
12 with, though, that the exchange contractors' service area is
13 highly managed. And we do that by not threat of
14 regulations as a conjunctive use area. Due to the fact that
15 the exchange contracts, mentioned earlier, imposes monthly
16 limitations on our water supply that can be delivered to the
17 exchange contractors, we truly find ourselves short of water
18 during the summertime when we have to pump groundwater.

19 The purpose for all this is to state that as a result
20 the exchange contractors have developed and rely upon
21 conjunctive use of surface and groundwater resources, and
22 members of the authority, Exchange Contractors Water
23 Authority, manage the groundwater through price incentives
24 and disincentives and depending on hydrogeologic conditions.
25 They also effectively manage groundwater in the adjacent

1 areas by entering into cooperative agreements with areas
2 that do not pump groundwater, where to do so may incur
3 saltwater intrusion.

4 We have agreements that we try to encourage groundwater
5 problems and try to work with them to nullify that. We have
6 retained hydrologists to help develop the water plan for our
7 service area, and we manage our groundwater and surface
8 water consistent with those hydrologists' recommendations.
9 We also are cooperative with the groundwater management
10 agreements. We have cooperative groundwater management
11 agreements between members and local cities. We have seven
12 of them within our service area. And we do that so we can
13 conjunctively use our groundwater with those cities. And,
14 again, those cities rely upon groundwater recharge from our
15 surface area.

16 In addition, we have cooperatively worked with Fresno
17 and Madera Counties when they were writing their respective
18 groundwater county ordinances and, in fact, we received an
19 exemption from Fresno County's ordinance, and that was
20 because we demonstrated that we were responsibly managing
21 our groundwater resources.

22 The Board should always defer to local agencies for
23 groundwater management for the infrastructure and
24 management protocol that is in place. Furthermore, the
25 Board should never exercise jurisdiction over groundwater

1 pumping from wells in a conjunctive use service area that
2 are pumped in a manner that is consistent with that
3 particular service area's clean water management plan which
4 we have.

5 And with that, hopefully fairly quick.

6 Thank you.

7 CHAIRMAN BAGGETT: Thank you.

8 Steven Ottemoeller, Madera.

9 Got your comments also.

10 MR. OTTEMOELLER: Morning, Chair Baggett, Member
11 Silva. Yes, I did submit comments. I won't try to repeat
12 them all. I will also say that we support and endorse the
13 comments of ACWA to the extent that I heard them. I have
14 not seen them. But what I understand of what they
15 concluded, we support that conclusion.

16 I would like to point out that this letter from Madera
17 Irrigation District does represent the position of the
18 Madera ID. It also was derived from a comment effort by a
19 number of organizations and agencies within Madera County.
20 We share the resource to develop the comments that you may
21 get from over comments that are very similar in nature. We
22 all agree with the conclusion.

23 I guess I'd just like to also endorse a number of other
24 comments related to the notion that the report should not be
25 accepted and that the Board should accept the report but not

1 take any action regarding the report and also direct its
2 staff not to cite the report in any administrative or
3 judicial proceeding.

4 We are here because it appeared to a lot of folks that
5 we are moving in a direction that was never anticipated by
6 the Legislature or not endorsed by the Legislature, and that
7 was to expand jurisdiction of the State Board beyond what
8 everybody really understood it to be. So we would encourage
9 that the Board not go in that direction. I think the report
10 by Professor Sax was very instructive. We disagree with his
11 conclusions. He certainly developed the information that a
12 lot of people can look at and say, "Yes, indeed the intent
13 of the Legislature was not that this Board should take
14 control over a larger portion of the groundwater than it
15 specifically identified."

16 So, again, I would also finally like to endorse and
17 second the comments of Mr. Chedesyer just before me
18 regarding local control. We are making great efforts with
19 Madera County to coordinate our efforts for groundwater
20 control, and we do not see that it is in the interest of the
21 people of the state, for this State Board to take efforts to
22 administratively expand the role of the State Board with
23 respect to groundwater.

24 Thanks.

25 CHAIRMAN BAGGETT: Thank you.

1 The Nature Conservancy, Peter Yolles.

2 MR. YOLLES: Good morning, Chairman Baggett and Board
3 Member Silva. I was not able to provide written comments in
4 time, but I will E-mail them to Mr. Murphy.

5 If you would allow me to read some comments
6 briefly, I'd appreciate that.

7 Thank you.

8 My name is Peter Yolles. I represent the Nature
9 Conservancy. The Nature Conservancy's mission is to
10 preserve the plants, animals and natural communities that
11 represent the diversity of life, honor, by protecting the
12 land and water they need to survive. The Nature Conservancy
13 along with its partners has been working to protect and
14 restore aquatic health to rivers and streams throughout
15 California.

16 In many cases groundwater has a significant impact on
17 the volume, temperature and climate in surface flows that
18 are critical to maintain valuable aquatic habitat. Because
19 of the critical connection between groundwater and
20 ecologically healthy rivers, the Nature Conservancy supports
21 the Board efforts to clarify its permitting authority over
22 groundwater preparations and more specifically encourages
23 the Board to pursue Professor Sax's three point strategy for
24 dealing with the problem of groundwater, surface water
25 management in California.

1 The Nature Conservancy has been working in two
2 watersheds that illustrates both the peril of unregulated
3 groundwater use and the promise of comprehensive basin
4 management. When the Consumnes River, the last unremaining
5 -- the last remaining undammed river flowing in the western
6 Sierra Nevada, excessive groundwater pumping has lowered the
7 groundwater table, changing the Consumnes from a gaining to
8 a losing river.

9 A consequence of this change is that the river ceases
10 flowing earlier in the year, stays drier longer into the
11 fall and dries over an increasing long reach compared to the
12 historic conditions.

13 As a specific example, historical records indicate that
14 the river now experiences its first continuous flow in the
15 fall necessary for salmon migration upstream in the Delta to
16 the spawning grounds an average of more than one month later
17 than under historic conditions. Other known or potential
18 impacts on the public trust value include lowering of the
19 groundwater table within the riparian zones, lost riparian
20 vegetation, impairment of oak forest regeneration and loss
21 of seasonal wetlands.

22 Making changes so that the Board has the tools when
23 local or regional solutions are insufficient to manage
24 groundwater uses that diminish appreciably and direct the
25 flows of subterranean streams, as Professor Sax states, may

1 help prevent any increment of further lowering of
2 groundwater that will, in our view, have a significantly
3 negative affect on these habitats and public trust values in
4 the Cosumnes and other rivers.

5 The Board's role can be a positive force in more
6 efficient water use and planning in California. For
7 example, in Mill Creek the Nature Conservancy has signed a
8 cooperative agreement with the Department of Water Resources
9 for a conjunctive use project. In a groundwater basin
10 hydraulically connected to the river, the Conservancy pumps
11 water to irrigate restored oak woodlands during summer and
12 fall. When the spring-run salmon are returning the
13 Conservancy ceases pumping, thereby increasing natural flows
14 and improve spawning and rearing habitat.

15 Conjunctive use projects such as this one in Mill Creek
16 exemplifies the potential benefits of comprehensive basin
17 management and the promise of the Board continuing its
18 pursuit of clarifying its jurisdiction over groundwater
19 appropriation.

20 In summary, the Nature Conservancy encourages the Board
21 to utilize Professor Sax's recommendations of establishing
22 formal criteria to determine when groundwater is subject to
23 the Board's permitting jurisdiction and to pursue his three
24 points strategy. As the Cosumnes River and Mill Creek
25 examples illustrate, the Board's jurisdiction can have

1 beneficial impacts on the health of the state's rivers and
2 streams if it follows the recommendations of the Sax
3 report.

4 Thank you.

5 CHAIRMAN BAGGETT: Thank you.

6 Brendan Fletcher.

7 MR. FLETCHER: Good morning. It is still morning.

8 Chairman Baggett and Member Silva.

9 I also want to thank the Board for undertaking its
10 review and especially for the openness with which they have
11 done so. At the outset of this workshop, Chairman Baggett,
12 you mentioned the degree of freedom and the value that that
13 brings that the Board's ability to have workshops like this.
14 I'm not going to finish my sentence correctly, but you
15 understand the point. I would really encourage the Board to
16 continue to take advantage of its role in being able to look
17 at cases on a case-by-case basis on the one hand, and take
18 an overview through workshops such as these on the other.

19 I also would like to thank Professor Sax for all the
20 work he put into the report. It's a pretty extraordinary
21 document. And for those of us who are lawyers, really a
22 lesson in how to do historical research and how to do
23 historical reconstruction. Pretty impressive.

24 I'm going to use my time to respond to some comments
25 that have come up today. Quite a few issues have come up

1 that I would like to address. Before I do that, though, I
2 do want to strongly endorse the report and conclusion that
3 the Board should follow an impact test in determining its
4 permitting jurisdiction over groundwater.

5 Now, a number of the speakers today in criticizing that
6 conclusion have stated the needs in their words, one way or
7 another, to get back to the statutory language. I think
8 that in the report, of course, the report cites statutory
9 language. We all look at Water Code Section 1200. We know
10 what those words are. The question really is what do those
11 words mean. And just reciting those words at the beginning
12 of the question, I think what Professor Sax did in that
13 report was look at the words, put them in their context and
14 come up with a very compelling answer to the question, what
15 do those words mean.

16 John Williams in his comments did the same thing, using
17 a slightly different tact, but also looking at the case law
18 that followed Pomeroy. The contemporary understanding of
19 the physical properties of groundwater and basically
20 responding to the question, what do those words mean. I
21 think we need to keep in mind that that question is not --
22 it requires interpretation and that is what the report did
23 very well.

24 We have also had a fair amount of discussion of common
25 sense. I'm a fan of common sense like all of us, and I

1 think that that was really the approach that Professor Sax
2 took in his report. He identified through a lot of research
3 that the Legislature was looking to solve a problem and do
4 so in a common sense fashion. He looked -- which is, you
5 know, what -- how do we deal with the problem of when
6 groundwater impacts surface water uses? How can we capture
7 that within what became Water Code 11 of the Section 1200.

8 They had tools, and those tools were developed through
9 the case law in the preceding decades for the most part, and
10 they use one. They used it, as Professor Sax concluded, to
11 capture within the Board's permitting jurisdiction those
12 groundwater uses that have an impact on surface waters.

13 I think that it is not coincidence that the test that
14 Professor Sax draws from his efforts directly addresses a
15 practical problem, and that is because those folks who wrote
16 Water Code Section 1200 had something practical in mind.

17 Moving on with Professor Sax's recommendations, I like
18 others just gone before me recommend that the Board take
19 further actions to implement and refine the conclusions of
20 Professor Sax's report. You certainly have the ability to
21 do so while you go with a case-by-case adjudication process,
22 and I think the dual tract process that had been employed
23 should be one that should be continued. So I would
24 encourage you. I am not going to make a recommendation as
25 to the format of that effort, but to develop a process for

1 adopting technical criteria, to adopt the provisions of the
2 Sax report.

3 Finally, I want to mention that the issue that the
4 cases that continue to come before you. A number of
5 commenters have mentioned that the Board should not and
6 staff should not cite to or otherwise use the Sax report. I
7 am not sure whether they mean on a permanent basis or
8 pending some further action. But really I am not sure it
9 really matters what they mean. Because the report is legal
10 authority; that is what it is. It is not a binding
11 decision. It is not the Supreme Court. And we know that,
12 but it is, like any other legal authority out there, to be
13 cited, and we continue -- I would certainly urge the Board
14 to use it as legal authority. So I don't think -- and I am
15 sure many will disagree that it is the proper legal
16 authority to follow. But, nevertheless, it is legal
17 authority and I don't think it is appropriate to set it in a
18 category of something else.

19 Finally, I brought in a letter today. I previously
20 submitted comments. I brought in a letter today signed by
21 -- a brief letter signed by a number of people, but I
22 haven't submitted that. I would like to do so. Not just my
23 group.

24 CHAIRMAN BAGGETT: Cal Trial, et al.?

25 MR. FLETCHER: Oh, yeah.

1 CHAIRMAN BAGGETT: We have that.

2 MR. FLETCHER: If any one needs additional copies, I
3 have it here.

4 Finally, I have a question. Did ACWA's comment get --
5 is there a public process for getting those?

6 CHAIRMAN BAGGETT: We will post all these comments on
7 our website. We really appreciate if you've got it
8 electronically if you can get it to our staff. It would
9 save them scanning it, would make for accurate transmittal.

10 MR. FLETCHER: That is it.

11 Thank you.

12 CHAIRMAN BAGGETT: Jerry Cadagan.

13 MR. CADAGAN: Thank you, Mr. Chairman, Mr. Silva. My
14 name is Jerry Cadagan. I am with an organization called the
15 Committee to Save Lake Merced, and I want to make three very
16 brief points, one of substance.

17 The first point is self-evident. I can't help making
18 it since I am here representing Save Lake Merced. We have
19 been talking about surface bodies of water that may or may
20 not be impacted by groundwater diversions. Everybody talks
21 about rivers. I happen to be a great river lover. There
22 are lakes also impacted, and Lake Merced happens to be one
23 of them.

24 Getting to the substance, a couple of commenters said,
25 people have used the term "common sense." Lake Merced is a

1 classic example of why the so-called impact test that
2 Professor Sax represented is the common sense test. I don't
3 know, and I don't think the hydrologists yet know, and trust
4 me there have been a lot of hydrologists who studied Lake
5 Merced, whether there is a kind of clearly defined
6 subterranean stream somewhere under Lake Merced that some
7 people think is contemplated by Water Code Section 1200.

8 CHAIRMAN BAGGETT: I don't think your microphone is
9 on.

10 MR. CADAGAN: I do know, I think, having read these
11 reports and having been working on this project for some
12 eight years now, that the pumping in the aquifer has
13 negatively impacted the lake level in Lake Merced, and,
14 therefore, also the water quality of Lake Merced.

15 I will just leave it at that. Common sense suggests to
16 me that what is pretty apparent on the ground, that certain
17 conduct is having a negative impact on a surface body of
18 water, we should be doing something about it.

19 My last comment, I'm reluctant to do this, but I'm
20 going to do it anyway. At least three commenters have said
21 leave it to local control. I am aware there is case law to
22 the effect local entities, counties, can regulate
23 groundwater pumping. Let me give you a true story of what
24 is going on around Lake Merced.

25 CHAIRMAN BAGGETT: I think we have an issue here. Isn't

1 there a petition pending before this Board?

2 MS. MAHANEY: There is a petition.

3 MR. CADAGAN: The store I'm going to tell you has
4 nothing to do with that petition. This is an aside from
5 that.

6 MS. MAHANEY: There is a complaint pending before the
7 Board. It is being held in abeyance right now, but I
8 caution Mr. Cadagan to recognize that.

9 MR. CADAGAN: I recognize that. The comment I am going
10 to make all came following -- the history I am about to
11 recite follows the filing --

12 MS. MAHANEY: It is not an adjudicative proceedings yet.

13 CHAIRMAN BAGGETT: I am aware of the petition in the
14 file.

15 MR. CADAGAN: What I am going to say is all a matter of
16 public record and it all occurred since that petition was
17 filed.

18 CHAIRMAN BAGGETT: I think we have to be careful. You
19 can potentially discount two of us from hearing this case.

20 MR. CADAGAN: If that is the case, I will not continue.
21 Thank you very much.

22 CHAIRMAN BAGGETT: We have a lot of witnesses to this
23 subject, ex parte discussion. Mr. Katz would have it all by
24 himself.

25 We have two, one if necessary. Karla Kay Fullerton

1 from Fresno County Farm Bureau. Then Henry Rodegerdts from
2 State Farm Bureau.

3 MS. FULLERTON: Thank you, Mr. Chairman and Mr. Silva.
4 I appreciate the opportunity to come before you and actually
5 I am going to speak because I have a different perspective
6 than most people that have testified here today.

7 I have spent the last five years of my professional
8 career in Washington, and found it very interesting that
9 Professor Sax actually specifically cited a case that
10 happened in Washington and how Washington deals with the
11 integration of both surface waters and groundwaters. I will
12 have you know that it has brought the state with the second
13 highest rainfall in the country to its knees and to a
14 moratorium of water appropriation, because of the
15 integration and that legal finding that they found in the
16 State of Washington.

17 Basically, they filed this under a law that says all
18 groundwater, every single molecule, is hydraulically
19 contiguous to a surface water and has an impact to the
20 surface waters. Now Washington also faces an incredible
21 amount of endangered species listed on fish species.
22 Needless to say, there is no more appropriation of water in
23 the state of Washington until they figure out how to deal
24 with the ruling.

25 The unfortunate thing that has happened in the state

1 Legislature is that it is very difficult to find a technical
2 test that is able to prove a hydraulic continuity that
3 everybody can agree upon. You will note in Professor Sax's
4 report he even says in his small technical committee they
5 were unable with five people to come up with a consensus of
6 what a proper test would be to prove impact. It is very
7 difficult. They have spent five years in the Legislature in
8 Washington trying to fix the problem legislatively so that
9 they don't have to follow every single molecule is in
10 hydraulic continuity to every surface water molecule.

11 I warn you, do not, do not take those steps that
12 Professor Sax asked you to take because you could be in a
13 quandary that the state of Washington is in, and it will
14 bring us to our knees here in California.

15 There are a number of impacts that this could have upon
16 us. The first, of course, is the water rights impact. You
17 will have, I guarantee you, because of what we did in the
18 state of Washington, a flurry of applications to file on
19 your groundwater rights. More than you will ever want to
20 have to deal through and dig yourself under as an agency.

21 It is important that you look at the long-term
22 perspectives of this report sitting on the shelves and being
23 a report that you have authorized to have come before you.
24 That is why we feel it is really important that the Board
25 itself after these workshops finds -- comes to the finding

1 that you adopt and uphold that groundwater is a property
2 right pursuant to what is in the Legislature and, therefore,
3 you reject the Sax report. Without a finding from the Board
4 it continues to be a document that can be cited
5 administratively in the judicial system, and it could be
6 quite dangerous to sit out there for a report to be stated
7 upon.

8 So our recommendation is not only do you not take
9 action on this report, but, in fact, you do the opposite and
10 take action to rebut this report so that you don't get in
11 the quandary that Washington is currently in.

12 CHAIRMAN BAGGETT: Thank you.

13 Henry, California Farm Bureau.

14 That is the last card I've got.

15 MR. RODEGERDTS: Last one turned in. The pronunciation
16 is Rodegerdts.

17 Chairman Baggett and Member Silva, my name is Henry
18 Rodegerdts, and I am an attorney for the California Farm
19 Bureau Federation, which as you probably are aware is the
20 state's largest general agricultural organization with over
21 40,000 farm family members, many of whom are overlying
22 landowners with groundwater rights throughout the state.
23 And as a result these members in the organization have a
24 direct interest in the state's legal classification of
25 groundwater.

1 At the outset let me say that the California Farm
2 Bureau Federation is happy to adopt and concur with the very
3 carefully considered comments and report prepared by ACWA on
4 this issue. As we suggest in our very short letter of April
5 2, We are quite concerned with the recommendations made by
6 Professor Sax. In short, in our view the report advocates
7 the State Water Resources Control Board expand its
8 regulatory and permitting authority over percolating
9 groundwater through four different mechanisms.

10 The recommendations within the report encourage that
11 the Board expand its jurisdiction through administrative
12 means rather than through the change in current California
13 law. Such expansion of the Board's authority is not
14 supportable either from the report or under existing
15 California case law or legislative history. Expansion of
16 such authority through administrative process rather than
17 through the legislative process in our view is probably
18 illegal and certainly inappropriate.

19 The Board should resist any temptation to implement the
20 recommendations contained in the report. The report
21 concludes that the Water Code Section 1200 was designed to
22 create an impact test rather than a physical test to
23 determine state permitting authority over subterranean
24 streams. The legislative history of Section 42 of the Water
25 Commission Act, which became Water Code Section 1200,

1 clearly indicates that the Legislature purposely adopted the
2 Pomeroy court language for subterranean streams when
3 creating its limited jurisdiction over groundwater.

4 The report itself contains the most likely explanations
5 of the Legislature adoption of such language was that it was
6 familiar. Since the Legislature adopted language in the
7 Pomeroy decision, the logical conclusion is that Legislature
8 intended to cause by the Pomeroy subterranean stream
9 standard when they enacted Water Code Section 1200. It is
10 unclear how the report can come to an opposite conclusion
11 based upon this legislative history as described in Sax's
12 report itself.

13 Further, the Legislature has had several opportunities
14 since the adoption of the Water Code section to change the
15 subterranean stream standards to an impact test. The
16 Legislature clearly denied the opportunity to enact
17 comprehensive groundwater legislation that would expand the
18 state's permitting jurisdiction when it passed AB 3030 and
19 other groundwater management provisions in the law which
20 instead continue to recognize the local control of
21 groundwater.

22 Subterranean stream language, the Water Code Section
23 1200, remains virtually unchanged since its adoption. The
24 legislative history of this important section, which clearly
25 limits the Board's jurisdiction over groundwater and the

1 Legislature's subsequent disinclination to make further
2 changes in its limited jurisdiction leads us to only one
3 conclusion, that the Legislature did not intend for the
4 State Board to regulate groundwater other than subterranean
5 streams flowing in a known and definite channel.

6 Subsequently, it is up to the California Legislature to
7 change the Board's jurisdiction over groundwater, not for
8 the Board to do so.

9 More troubling is the report's recommendation to
10 change interpretation of 1200. The Board's expanding the
11 Board's jurisdiction outside of Water Code Section 1200
12 (jurisdiction), especially since the Board -- the report
13 attempts to find a way for the Board to regulate the use of
14 groundwater by overlying landowners or, in other words,
15 regulate the use of groundwater by California farmers.

16 While the Board does have the legal right to enforce
17 the reasonable use mandate of Article X, Section 2, of the
18 California constitution, there is no independent authority
19 over percolating groundwater within the law. Additionally,
20 there is no legal precedence for applying the Public Trust
21 Doctrine to percolating groundwater. The report's reliance
22 on National Audubon Society versus Superior Court ignores
23 the context of the court's review of National Audubon which
24 applies to appropriative rights issued by the State Board.
25 In other words, the Board lacks the authority to apply the

1 Public Trust Doctrine to water rights and water uses over
2 which the State Board has no permitting authority.

3 Until the Legislature or the courts state differently,
4 the Board has no independent authority over percolating
5 groundwater outside of enforcing reasonable use mandates.
6 In short, the Farm Bureau and its members cannot support the
7 Board's adoption or implementation of any of the
8 recommendations contained in the report. If the state wants
9 to regulate and permit groundwater other than subterranean
10 streams, it must obtain its jurisdiction through
11 legislation, not administrative fiat.

12 Thanks for your patience and understanding.

13 CHAIRMAN BAGGETT: Thank you.

14 Any other comments?

15 If not, we certainly appreciate you all taking the time
16 and making comments available to the Board, to our staff.
17 And we will continue this workshop tomorrow in Ontario,
18 10:30, at which point -- after which we will get back to
19 you, let you know where we are headed.

20 Thanks.

21 (Hearing adjourned at 11:30 a.m.)

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1 REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, ESTHER F. SCHWARTZ, certify that I was the official Court Reporter for the proceedings named herein, and that as such reporter, I reported in verbatim shorthand writing those proceedings;

That I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 3 through 92 herein constitute a complete, true and correct record of the proceedings.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 17th day of April 2002.

ESTHER F. SCHWARTZ
CSR NO. 1564

